

ADVISORY OPINION 2002 - NO. 1
Appearance in an Official Capacity - the Gift Exemption
August 8, 2002

This Advisory Opinion is submitted on the Board's own motion pursuant to the provisions of RCW 42.52.320 and Board Rule 1K.

Issue

What characteristics of proposed legislative travel need to be established to exempt payment of expenses from the definition of "gift," pursuant to the Ethics in Public Service Act (Act) for expenses related to an appearance made in an official capacity?*

Opinion

We begin by recognizing that both the legislature and the Ethics Board have a role to play when the issue is the expenditure of public or third party funds to pay for legislator's travel. The Board will make the following inquiries to determine if the payment of travel and/or lodging is subject to the gift exemption provisions of the Act.

1. Has the legislature analyzed the travel request and found that the performance of legislative duties are involved? This determination is an important factor for the Board to consider when applying the Act.

2. In addition, if a third party has offered to pay the travel expenses, another factor for the Board to consider would be notwithstanding that offer to pay, would the legislature otherwise view the expenses as a proper expenditure of public funds from its own budget?

and:

3. Is the legislative purpose of the trip substantive and not minor? Non-exclusive factors which help determine the answer to this question are; (a) an invitation, itinerary, or agenda which shows that the legislator is required to attend official functions, given assignments in advance or make presentations at official functions; and (b) the legislator performs substantial services on behalf of the state or the legislature.

If the answers to these questions are "yes," the gift exemption for travel expenses, found in RCW 42.52.010(10)(d) for an appearance made in an official capacity is applicable.

*We emphasize that this opinion is restricted to the "appearance in an official capacity" issue raised by the gift exemption. Other portions of the Act (e.g., "reasonable expectation" analysis; involvement of lobbyists; solicitation of travel; and excessive travel costs) may dictate a different result even if the travel is not a "gift."

Background and Analysis

The Act exempts the payment of certain travel expenses for legislators from the definition of gift. RCW 42.52.010(10)(d) states that gifts do not include:

Payments by a governmental or nongovernmental entity of reasonable expenses incurred in connection with a speech, presentation, appearance, or trade mission made in an official capacity. As used in this subsection, "reasonable expenses" are limited to travel, lodging, and subsistence expenses incurred the day before through the day after the event.

The Act does not define an "appearance . . . made in an official capacity." For the exemption to be applicable there must be a legislative purpose to the trip. See: **Senate Opinion 78 - 1; House Opinion 89 - 3; and Advisory Opinions 95 - No's. 2 & 10; 96 - No. 10; and 98 - No. 2.**

The House and the Senate have adopted travel policies and procedures which are designed to fit their needs and philosophy. Our experience with the legislature on travel issues has shown that legislative leadership, and the Chief Clerk and Secretary of the Senate, carefully scrutinize travel requests which might result in the payment of expenses from funds under legislative control.

However, in some cases these expenses may be paid or reimbursed by a third party. It is possible, moreover, that leadership and administrators will have no knowledge of this type of travel because it does not involve a request to use legislative funds and House or Senate approval would not normally be required. Both situations, where there is a request for authority to travel and where travel arrangements are proposed outside the framework of legislative approval, are subject to the Act. The former provides an opportunity for the legislature to analyze the request to determine if it is consistent with its own policies and the Act. Less opportunity to preview travel requests is likely to exist in cases involving third-party payers.

One opportunity for preview of proposed travel paid by a third party is the recent agreement between the Executive Ethics Board and the University of Washington. This agreement provides that any proposed payment of travel expenses by the University for legislators to football bowl games will be submitted to the legislature for preview for compliance with the legislature's requirements and the requirements of the Act. As presently structured, legislator's travel to these games as guests of the University would not satisfy the requirements of the Act for gift exemptions but the Board supports and encourages institutional preview in the case of all third party payers. This might be accomplished, for instance, by requiring the submission of travel requests when third party payers are involved so that those requests are evaluated for compliance with legislative standards and compliance with the Act.

During the Board's thorough public discourse on the topic of legislator's as travel guests of third parties, the proposition that public institutions should be viewed differently than other payers has been discussed. The Act does recognize that public institutions, as well as other entities, often deserve a legislative presence at their events as a show of support and recognition. RCW 42.52.150 contains a presumption that certain gifts to legislators are presumed to be acceptable, regardless of value. In pertinent part, that statute permits:

(2)(g) Admission to, and the cost of food and beverage consumed at events sponsored by or in conjunction with a civic, charitable, governmental, or community organization; . . .

If the legislature were to decide that travel and lodging expenses should also be entitled to this presumption an amendment to the Act is its prerogative. Similarly, if the legislature determines that the payment of travel and lodging expenses for attendance at events sponsored by or conjunction with a governmental organization should be excluded from the definition of gift, it may of course provide for that as well. We express no opinion on these prerogatives of the legislature.

In sum, the Act permits a government or nongovernmental entity to pay "reasonable expenses," as defined by RCW 42.52.010(10)(d), when legislative duties are performed, the legislature views the

payment as a proper expenditure, and the legislative purpose of the trip is substantive as evidenced by identification of substantial services on behalf of the state or the legislature.

This Board has had many occasions to formally declare the desirability and the necessity of a strong legislative presence in decisions related to legislative travel. For example, in **Advisory Opinion 1995 - No. 10** we observed that the House had used its travel policy analysis to conclude that a proposed legislative tour would be educational and important for certain members and staff to attend and we acknowledged *"the House's important role over the travel and educational activities of its committees."* In **Advisory Opinion 1996 - No. 1** we found the Act did not prohibit acceptance of travel contributions from non-lobbyists *"so long as the house to which the legislators belong has officially approved the conference as dealing predominantly with educational issues of legislative concern."* (emphasis added)

By rule, the Board has requested the Chief Clerk of the House and the Secretary of the Senate to appoint in-house attorneys as "Designated Ethics Advisers" to assist each house with advice and analysis based on the Act and the published opinions of the Board. These advisers may consult with Board Counsel and when the informal advice is concurred with the Board will give weight to the fact that the person who may be charged in a complaint relied in good faith on staff advice (**Board Rules L and M - page 77, 2002 Ethics Manual**). The houses have made the appointments and the process has allowed for consultation and collaboration on many questions which may require consideration before the Board is able to schedule a meeting and formally consider the issues. The Board believes that this type of interaction with the legislature works to the benefit of all concerned.